

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE SCOTSMAN PRESS, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1978	:	
through August 31, 1983.	:	

Petitioner, The Scotsman Press, Inc., P.O. Box 4970, 250 Bear Street, Syracuse, New York 13211-4970, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1978 through August 31, 1983 (File No. 801454).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, State Office Building, 333 East Washington Street, Syracuse, New York on July 16, 1987 at 9:15 A.M., with all briefs to be filed by February 18, 1988. Petitioner appeared by Lombardi, Devorsetz, Stinziano & Smith, Esqs. (Bruce E. Wood, Esq., of counsel). The Audit Division appeared by John P. Dugan Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether a certain publication produced by petitioner properly qualified as a shopping paper under section 1115(i) of the Tax Law, thereby allowing exemption from tax for petitioner's purchases of ink and paper used in the production of said publication.

II. Whether, alternatively, petitioner's publication constituted a newspaper thereby gaining benefit of exemption under Tax Law §§ 1115(a)(5), 1118(5) and 20 NYCRR 528.6.

III. Whether Tax Law § 1115(i) violates constitutional standards as being discriminatory in drawing a distinction between shopping papers and other publications, and/or is constitutionally void for vagueness.

IV. Whether the Audit Division's method of auditing petitioner's publication (based on a sampling of issues of the publication), and its method of calculating advertising versus nonadvertising space, were proper.

FINDINGS OF FACT

1. On June 12, 1984, following a field audit, the Audit Division issued to petitioner, The Scotsman Press, Inc., two notices of determination and demands for payment of sales and use taxes due assessing additional tax due for the period June 1, 1978 through August 31, 1983 in the aggregate amount of \$79,698.92, plus interest. These notices were preceded by a series of validated consents executed on behalf of petitioner allowing extensions of the period of

limitation on assessment. The latest of these consents allowed assessment for the period June 1, 1978 through February 28, 1981 to be made at any time on or before June 20, 1984.

2. At all times relevant hereto, petitioner published "The Scotsman Pennysaver", a weekly publication commonly referred to as a "shopping paper" or "pennysaver". This publication was distributed free of charge on a community-wide basis. It consisted primarily of paid advertisements, and petitioner derived revenue from the sale of such advertisements. Also forming a part of the publication were community service notices which petitioner included in the publication free of charge, as well as some articles of general community interest. Petitioner's publication of The Scotsman Pennysaver occurs weekly. Each such weekly issue consists of ten separate individual editions each geared to a certain geographical or regional area.

3. In addition to publishing The Scotsman Pennysaver, petitioner is involved in the business of printing pennysavers for others and in job printing for various businesses and individuals.

4. It should be noted that the full amount of tax assessed via the notices of determination herein pertains to tax calculated as due on petitioner's purchases of ink and paper used in the production of The Scotsman Pennysaver. On audit certain other areas of petitioner's business operations were examined, resulting in findings of tax due in substantially lesser amounts than those at issue per the notices of determination. Resolution on those other issues was reached prior to issuance of the notices, hence leaving only the tax assessed on purchases of ink and paper at issue herein.

5. Upon audit, the Audit Division first attempted to determine whether petitioner's publication constituted a shopping paper as defined by section 1115(i) of the Tax Law. At the commencement of the audit, the Audit Division requested that petitioner provide copies of issues of The Scotsman Pennysaver for certain dates. In a small number of instances, copies of each of the regional editions for some of the issue dates originally requested for review by the Audit Division were unavailable. However, petitioner was able to produce a complete set of regional editions for each of eleven issue dates ultimately settled upon between the Audit Division and petitioner as those issues to be reviewed.¹ The specific issue dates reviewed by the Audit Division (see ___ Footnote "1") were agreed to by petitioner as being representative of petitioner's publication for the entire audit period.

6. Upon analysis of each of the ten regional editions for each of the eleven issues, the Audit Division determined that petitioner's publication could not be considered a shopping paper during the audit period because during said period 90 percent or more of the printed area of each of the publications consisted of advertisements.

7. Petitioner challenges the Audit Division's conclusion that its publication is not exempt from tax as a shopping paper. However, the dollar amount of the tax calculated as due by the Audit Division is not in dispute. This calculation was based upon a detailed audit of the amount of ink and paper purchased in total by petitioner, with an allocation thereof to The Scotsman Pennysaver based upon a time and usage study of printing jobs as conducted by petitioner.

8. In its calculation of the portion of printed area in each issue devoted to advertising, the

¹The specific issue dates examined were 5/30/79, 3/12/80, 6/18/80, 6/30/80, 11/5/80, 2/25/81, 4/22/81, 8/5/81, 9/9/81, 12/2/81, and 8/11/82.

Audit Division first determined the area available for printing on each page of each edition of the publication. This area amounted to 168 square inches per page and did not include the borders along the edges (tops and sides) of each page. The area available for printing on each page was then multiplied by the number of pages in each edition of each issue to determine the total area available for printing for each issue.

9. The Audit Division next determined the area on each page consisting of nonadvertising space. Included among the areas considered to be nonadvertising were the front page masthead (banner), the editorial box, public service announcements, and the mail-in coupon portion of an ad wherein a reader could send in his or her own ad for future publication. In its measurements, the Audit Division dealt with "air space" or "gutter space" (the white area between adjacent columns of advertisements, and between columns of advertisements and display ads) in the following fashion: The air space between an advertisement and a nonadvertisement was allocated 50 percent as nonadvertising space and 50 percent as advertising space; the air space between two advertisements was treated as 100 percent advertising; and the area between two nonadvertisements was treated as nonadvertising space. The results of these measurements were totalled and a ratio was established comparing nonadvertising space to total available space per issue. This ratio in turn was used as the basis for determining whether the printed area of the publication consisted of 90% or less of advertising (i.e., total space less nonadvertising equals advertising).

10. The above described method of calculation, known in the vernacular as the "subtractive" approach, resulted in a conclusion by the Audit Division that none of the editions of petitioner's publications complied with the exemption requirements of Tax Law § 1115(i), in that in each case more than 90% of the publication consisted of advertising. (The criterion for exemption established under Tax Law § 1115[i] was referred to during the course of the proceeding as the "90/10 rule".)

11. Subsequent to the Audit Division's audit calculations, staff members of petitioner reviewed four issues of the publication (issues published in September 1983), arriving at a calculation whereby 3.89% of petitioner's classified advertisements represented nonpaid advertisements. These nonpaid advertisements were described as "civil service" advertisements, specifically consisting of, inter alia, advertisements placed by policemen, firemen or civil service agencies. The Audit Division accepted petitioner's calculation that 3.89% of its advertisements were "civil service" advertisements. However, even after revision of the original audit results based on this calculation, the Audit Division's method of calculating still resulted in a conclusion that none of petitioner's publications met the 90/10 rule such as to qualify as a shopping paper per Tax Law § 1115(i).

12. Based upon the foregoing audit calculations, the Audit Division imposed tax on the ink and paper utilized by petitioner in producing The Scotsman Pennysaver based, as noted, upon the time and usage analysis prepared by petitioner.

13. To further detail the Audit Division's determination with respect to advertisements versus nonadvertisements, the Audit Division considered public service announcements, articles of general interest, and the publication's masthead to be nonadvertisements. The Audit Division determined all paid advertisements, including classified ads (as later adjusted for "civil service" ads), to be advertisements. Sections of the publication which promoted the publication's own services ("house ads") were also considered advertisements, except that any portion of such sections which included an area (mail-in coupon) for use by a reader to write down his or her own advertisement and submit it to petitioner to be published was considered nonadvertisements.

Finally, areas of the publication devoted to highlighting advertisements of a similar nature (e.g., a banner heading for "Restaurant Guide" or "Dining Out") were considered to be advertisements in their entirety.

14. Subsequent to the Audit Division's calculations, and the noted revision thereto, petitioner's staff analyzed four issues of the publication, specifically those issues dated 5/30/79, 2/25/81, 8/5/81, and 8/11/82 (which issues were also included among the issues reviewed by the Audit Division), utilizing its own method of calculation known in the vernacular as the "additive" approach.

15. As a starting point under petitioner's method of analysis, the total available area for print on each page was 168 square inches, which amount agrees with that used as a starting point by the Audit Division.

16. Petitioner's method of analysis centers upon computing the amount of total printed advertising space in each of the issues. In essence, petitioner's approach focuses on totalling the square inches of ad space, and comparing said total to the total printed area per page. The main specific discrepancies between petitioner's method and the Audit Division's method involve the banners or headings for like-groups of advertisements (e.g., "Restaurant Guide"), the house ads, and the air space between ads. The like-group headings themselves are not sold to any particular advertiser or group of advertisers. With respect to the latter items, petitioner's method treats house ads as nonadvertisements and also excludes all of the air space between ads in its calculation of the amount of advertising (since only an advertisement itself is measured).

17. At hearing, petitioner provided a description of the manner of composing (putting together) its publication. Ads are sold by the column inch (the width of a given column [which is a function of the layout of a particular issue] times the depth of a column measured in half-inch increments). During the period in question, petitioner's publication varied between five, six, and seven columns in width. Layout and presentation are accomplished in large measure by using air space to align the printed pages in a square (or rectangular) format. If an advertiser places an ad which utilizes a printed area encompassing 3-1/4 column inches of space, the advertiser is charged for 3-1/2 inches of column space (thereby being charged for the additional 1/4 inch of space upon which printing does not appear). Air space, being largely a function of format presentation, is not sold per se.

18. Utilizing petitioner's method of determining compliance with the 90/10 rule, which as noted does not include any measurement of air space and which treats house ads and banner headings for like-group ads as nonadvertising, the four issues analyzed by petitioner all comply with the 90/10 rule.

19. To more specifically describe petitioner's method of analysis, petitioner measured the size of each of its display ads to the longest one-half inch, and measured the length and width of each column of classified advertisements. Petitioner also treated house ads (e.g., ads for "carriers wanted", "use our paper", "use Scotsman Printers", and the entire area of advertisement and coupon to be used for a potential advertiser in placing an ad) as well as like-group banners (e.g., Dining Guide) and civil service ads (ads placed by, inter alia, firemen and policemen), as nonadvertisements.

20. Some articles of general interest or community interest are included in every issue. These articles, as well as other items including photographs and petitioner's own house advertisements, were described in testimony as being "fill" utilized to "finish off" the publication

in terms of layout and format presentation. Petitioner never employed any reporters nor did it subscribe to any news services (e.g.____, Associated Press, United Press International, etc.).

21. As noted, only a few editions from some of petitioner's issues were unavailable at the time of audit. While the Audit Division initially requested that petitioner furnish issues for certain specific dates for audit review, it is clear that in instances where petitioner was unable to furnish a complete set of editions for a specific issue date, other dates where a complete set of editions was available were agreed upon and substituted. Petitioner agreed to the use of the issue dates specified in footnote "1" for purposes of audit review, and a complete set of all 10 editions of each of the 11 issues on these dates was available and was reviewed. Petitioner admitted that the issues reviewed and analyzed upon audit constitute a representative sample of petitioner's publication.

22. In July 1983, the Department of Taxation and Finance published Memorandum TSB-M-83(20)S, "Shopping Papers and Advertising Supplements", for purposes of clarifying the Department's policy regarding the term advertisements and the 90/10 rule for shopping papers. The memorandum defined advertisements as:

"all the material for the publication for which the publisher receives consideration and which calls attention to something for the purpose of getting people to buy it, sell it, seek it, or support it. 'Advertisements' also include any printed area in which the shopping paper advertises its own services.... The area devoted to public service announcements, the publication's banner head [sic] and the editorial box should not be considered as 'advertisements' either, when applying the ninety percent rule; nor should any area provided for free classified advertisements."

The Audit Division followed the guidelines set forth in the memorandum in making the determination that petitioner's publication did not comply with the 90/10 rule.

SUMMARY OF THE PARTIES' POSITIONS

23. Petitioner asserts that it made a good faith attempt to comply with the statutory language of Tax Law § 1115(i) and that its publication meets the 90/10 rule set forth therein. In so asserting, petitioner raises a number of issues. First, petitioner contends that the methodology used to determine its compliance with the 90 percent advertisement requirement was improper in that the Audit Division improperly focuses upon determining that portion of the publication's space consisting of nonadvertisements, rather than determining the amount of space which consisted specifically of advertisements. Petitioner contends that the banner headings over like-group ads (e.g.____, Dining Guide) did not constitute advertisements and that petitioner did not charge any greater fee to its advertisers for placement of an ad in such a specially designated area. Petitioner also contends that the Audit Division's method improperly included air space, as described, in the calculation base. Petitioner maintains that air space constitutes nonadvertising in its entirety, and that it is so treated under petitioner's method of computation (the additive approach). Petitioner also contests the Audit Division's treatment of house ads, as described, as constituting advertisements.

24. Petitioner also alleges that the Audit Division's sample of issues reviewed on audit is inadequate for purposes of determining whether any of petitioner's publications qualified under the 90/10 rule during the audit period, in essence maintaining that use of any sample, as opposed

to a full review of each edition of every issue, was improper.

25. Petitioner further asserts that its publication qualifies for exemption as a newspaper under Tax Law §§ 1118(5) and 1115(a)(5). In the context of the assertion that the publication constitutes a newspaper, petitioner raises a number of challenges to the constitutionality of Tax Law § 1115. More specifically, petitioner asserts that said statutory section as drawn is unconstitutional in discriminating between shopping papers and other types of publications on the basis of content, in violation of the due process, equal protection, and freedom of the press provisions of both the United States and New York State constitutions.

26. Petitioner also maintains that said statute (Tax Law § 1115), specifically subsection (i) thereof, is unconstitutional in that it is overly vague. In this vein, petitioner asserts that the 90/10 rule as phrased insufficiently defines what constitutes advertising, thus leaving said rule open to interpretation and different measuring methods resulting in arbitrary and capricious denials of tax exemption. Petitioner asserts that substantially different methods of measuring have been used by the Audit Division in its audits of various shopping papers.

27. Petitioner asserts further that the Audit Division did not make available sufficient guidelines by which a taxpayer could determine whether or not, upon audit, its publication would comply with the exemption provision of Tax Law § 1115(i). Petitioner notes that the Department of Taxation and Finance Technical Services Bureau Memorandum on this topic (TSB-M-83[20]S) was not issued until July 1983, and was not available to petitioner during the period under audit. Petitioner also alleges that this memorandum does not constitute a properly promulgated rule or regulation and should be accorded no weight. No inquiries were formally made by petitioner to the Audit Division for advice as to the Audit Division's position on the 90/10 rule, but rather petitioner relied upon advice from the New York State Advertising and Publishing Council (an industry group) to the effect that fill ads (e.g., house ads) were not advertising. It is noted that the Audit Division's audit herein was commenced in November of 1980, but was held in abeyance during the pendency of ongoing discussions between representatives of pennysaver publishers and the Audit Division. The audit was subsequently resumed on August 18, 1983.

28. The Audit Division maintains, by contrast, that the statute (Tax Law § 1115[i]) does not distinguish between paid and unpaid advertisements, but simply refers to advertisements. The Audit Division also asserts that the Division of Tax Appeals is without jurisdiction to pass upon the facial constitutionality of the statute, maintaining that constitutionality is presumed at the administrative level. The Audit Division further asserts that Tax Law § 1118(5) specifically exempts paper, but not ink, used in the production of newspapers and periodicals. Therefore the Audit Division maintains that even if petitioner qualifies as a newspaper, as defined, only the paper and not the ink used in its production would be exempt from tax.² The Audit Division notes, by comparison, that Tax Law § 1115(a)(20) does exempt both paper and ink used in the publication of a shopping paper as defined by Tax Law § 1115(i).

29. The Audit Division contends that the statutes in question and the legislative history surrounding their enactment draw a definitional distinction between shopping papers and newspapers and between shopping papers and advertising fliers and supplements. The Audit

²In this vein, the Audit Division maintains that 20 NYCRR 528.6(f)(1) is invalid insofar as it purports to exempt ink used in the production of a newspaper.

Division notes that petitioner inconsistently alleges that it is a newspaper while admitting that it is a "legitimate shopping paper". The Audit Division asserts that petitioner's primary purpose in publishing The Scotsman Pennysaver appears to be that of publishing a shopping paper and not a newspaper. Finally, the Audit Division maintains, with regard to the argument that the audit sample herein used was improper, that petitioner consented to the use of such sample at the time of audit and admitted that said sample was representative of the subject publication throughout the audit period.

CONCLUSIONS OF LAW

A. The first question presented is whether petitioner's publication is a shopping paper. Shopping papers are entitled to exemption from sales and use taxes pursuant to the provision of Tax Law § 1115. More specifically, Tax Law § 1115(a)(20) provides for an exemption from the sales tax imposed pursuant to section 1105(a), and compensating use tax imposed pursuant to section 1110, upon "[p]aper, ink and any other tangible personal property purchased for use in the publication of a shopping paper...which is to become a physical component part of such paper."

B. The term "shopping paper" is defined by Tax Law § 1115(i)(B) and (D) as follows:

"(B) For purposes of this subdivision, the term 'shopping paper' shall mean those community publications variously known as consumer papers, pennysavers, shopping guides, town criers, dollar stretchers and other similar publications, distributed to the public, without consideration, for purposes of advertising and public information.

* * *

(D) The term 'shopping paper' shall not include mail order and other catalogs, advertising fliers, travel brochures, house organs, theatre programs, telephone directories, shipping and restaurant guides, racing tip and form sheets, shopping center advertising sheets and similar publications."

C. For purposes of Tax Law § 1115(i), subparagraph (B) and (C) thereof set forth requirements to be met by a publication in order to be defined as a shopping paper and thereby gain the benefit of exemption. Of the requirements set forth, only the following requirement is at issue herein:

"The advertisements in such publication [a shopping paper] shall not exceed 90 percent of the printed area of each issue." (Tax Law § 1115[i][C].)

Upon audit, the Audit Division concluded that petitioner's publication failed this requirement, which conclusion petitioner challenges.

D. Initially, it is noted that petitioner herein seeks an exemption from tax. As a general proposition, statutes creating tax exemptions are to be strictly and narrowly construed (Matter of Grace v. State Tax Commission, 37 NY2d 193; Matter of Old Nut Company v. New York State Tax Commn., 126 AD2d 869, 871, lv denied 69 NY2d 609). The burden of proving entitlement to a tax exemption rests with the taxpayer (Matter of Young v. Bragalini, 3 NY2d 602). To

prevail, petitioner must establish not only that its interpretation of the law is a plausible one, but also that its interpretation is the only reasonable construction (*Matter of Lakeland Farms Co. v. State Tax Commission*, 40 AD2d 15).

E. Here, petitioner has failed to meet its burden of establishing that its interpretation of section 1115(i)(C) is the only reasonable interpretation and that the Audit Division's interpretation thereof was unreasonable (*see* *Matter of Blue Spruce Farms v. State Tax Commission*, 99 AD2d 867, *affd* 64 NY2d 682; *Matter of Irondequoit Shopper Inc.*, *State Tax Commission*, January 16, 1987). More specifically, the Audit Division's determinations as to which areas of petitioner's publication constituted advertising and which areas of the publication constituted nonadvertising were reasonable and within the meaning and intent of section 1115(i) of the Tax Law. Petitioner failed to show wherein such determinations were unreasonable and outside the scope of said section. For example, the Audit Division's determination that banners denoting a section of like-group advertisements constituted advertisements was reasonable. Such banners clearly called attention to specific advertisements within the section. Thus, notwithstanding the fact that petitioner did not charge its advertisers any additional fee to have their ads placed in the special sections, the enhancements to the specific ads provided in the special sections, such as the banner, were part of the specific advertisements themselves. In addition, the Audit Division's treatment of air space, determining that one half of the space between advertising and nonadvertising areas constituted advertising, that 100% of the space between two advertisements constituted advertising and that 100% of the space between nonadvertisements constituted nonadvertising, was reasonable. Finally, it was not unreasonable for the Audit Division to treat petitioner's house ads or fill ads as advertisements, notwithstanding that said advertisements did not specifically generate compensation to petitioner.

F. Petitioner's contention that Tax Law § 1115(i)(C), properly interpreted, requires adoption of petitioner's method of calculation, which determines the ratio of the area of specific advertisements to the total area available for printing (the "additive approach"), is rejected. This interpretation as carried out in petitioner's calculations would exclude banners calling attention to related advertisements, house ads, and all air space between advertisements and between advertising space and nonadvertising space (which air space at least serves to separate printed items making them readable). Such an interpretation would allow a publication to qualify for the shopping paper exemption merely by increasing the amount of unused space in the publication.³

³Petitioner argues that the term "printed area", as used in the statute, means only those areas of the publication upon which ink has been physically imposed, and contrasts this meaning against "printable area" (the area available for printing). Petitioner maintains the Audit Division's method of analysis goes beyond the words of the statute in that Audit's measurements cover more than the "printed area" of the publication (i.e., said measurements improperly include air space). Thus, petitioner asserts its method of measurement must be adopted as the only reasonable means of implementing the words of the statute. However, this argument fails to admit that an equally reasonable interpretation of "printed area" would, as the Audit Division did, define such term to mean the entire area encompassed within (and defined by) the outer boundaries or margins of each page.

G. Notwithstanding the foregoing conclusion that petitioner's publication does not qualify for exemption as a shopping paper, there remains the issue of whether said publication is entitled to exemption as a newspaper.

H. Section 1115(a)(5) of the Tax Law exempts receipts from the sale of newspapers and periodicals from the sales and use taxes imposed pursuant to sections 1105(a) and 1110 of the Tax Law. Section 1118(5) exempts, specifically, from use tax the paper (but not ink) used in the publication of newspapers and periodicals. Petitioner seeks exemption under sections 1115(a)(5) and/or 1118(5) upon the claim that its publication constitutes a newspaper.

I. Regulations of the Commissioner of Taxation and Finance, in effect as of January 31, 1979, provide, in relevant part, as follows:

"(b) Definition of a newspaper. (1) In order to constitute a newspaper, a publication must conform generally to the following requirements:

- (i) it must be published in printed written form at stated short intervals, usually daily or weekly;
- (ii) it must not, either singly or, when successive issues are put together, constitute a book;
- (iii) it must be available for circulation to the public; and
- (iv) it must contain matters of general interest and reports of current events.

(2) Notwithstanding the fact that a publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, financial, theatrical, political, religious, or sporting matters, nevertheless, if in addition to the special interest it serves, the publication contains general news, it is entitled to the classification of a newspaper.

Example 1: A braille edition of a newspaper is exempt.

Example 2: A publication distributed free of charge is not excluded from qualifying as a newspaper.

Example 3: A daily publication which consists of entries and selections at various race tracks with articles on matters of general interest and reports of current events is a newspaper. However, publications which are merely tip sheets or form sheets are subject to tax.

Example 4: A microfilm copy of a newspaper is not a newspaper and the sale of such microfilm is the sale of tangible personal property subject to tax.

Example 5: An individual engaged in the business of clipping and selling newspaper articles is not selling newspapers but is selling an information service which is subject to tax. See section 527.3 of this Title" (20 NYCRR 528.6).

J. With respect to the newspaper/periodical exemptions, it would appear that since petitioner's publication is distributed without charge, the exemption afforded by Tax Law § 1115(a)(5) upon receipts from the sale of newspapers and periodicals would not be applicable

even if petitioner's publication is a newspaper. With respect to section 1118(5), even if petitioner's publication is a newspaper, exemption would be allowable only on purchases of paper but not ink used therein (Tax Law § 1118[5]. Contra, 20 NYCRR 528.6[f][1]).

K. It is clear that the legislature has provided exemption for both newspapers (Tax Law §§ 1115[a][5]; 1118[5]) and shopping papers (Tax Law § 1115[a][20]), but in so providing has drawn a definitional distinction differentiating between the two based essentially upon purpose and content. Shopping papers, as noted, are specifically defined as publications "distributed ...without consideration, for purposes of advertising and public information". This definition and statement of purpose falls squarely in line with describing petitioner's publication. Moreover, in *Matter of G & B Publishing Co., Inc. v. Dept. of Taxation* (57 AD2d 18), a publication described in terms nearly identical to those describing petitioner's publication was held not to be a newspaper.⁴ In this case, petitioner's publication meets all of the definitional criteria of a shopping paper (as opposed to a newspaper) except for the percentage of advertisement criterion set forth in Tax Law § 1115(i)(C). But for its failure to meet this percentage test, said publication would be a shopping paper exempt from tax. Accordingly, it is concluded that petitioner's publication is not exempt either as a newspaper⁵ or a shopping paper.

L. Petitioner claims that the statute (Tax Law § 1115[i]) as drawn is facially unconstitutional insofar as it defines a publication to be a shopping paper (and thus determines exempt status) based upon that publication's content. This argument, however, presents a question beyond the jurisdiction of this forum. It is sufficient to note that the constitutionality of enactments of the New York State legislature is presumed at the administrative level.

⁴With respect to the content and purpose of petitioner's publication vis-a-vis its claim that it constituted a newspaper, it is noteworthy that the articles of general interest in petitioner's publication [see 20 NYCRR 528.6 (b)(1)(iv)] were described by petitioner's witness as "fill" (ee Finding of Fact "20").

⁵This conclusion is further buttressed by language contained in then-Governor Carey's approval memorandum filed in connection with enactment of Tax Law § 1115(i) (L 1977, ch 884) which provides in part as follows:

"[To qualify as a shopping paper]...at least 10% of each such publication must contain news or editorial comment of general or community interest.

* * *

[Laws of 1977 (ch 884)]...contains a definition of shopping paper which imposes sufficiently strict requirements so as to preclude the application of the exemption to publications which do not serve social purposes similar to those served by news-papers and periodicals which are currently exempted. The Commissioner [of Taxation and Finance] specifically points to the requirements that at least 10% of the publication consist of items other than advertising and that each issue contain news of general or community interest and community notices or editorial comment or articles by different authors." (1977 McKinney's Session Laws of NY, at 2532 [emphasis added].)

M. Finally, petitioner's contention that the number of issues reviewed by the Audit Division constitutes an insufficient sample and a full review of all editions of each issue should have been used is rejected. It is noted that petitioner, at the time of audit, clearly consented to the use of the specific issues requested by the Audit Division for audit purposes and agreed that said issues constituted a representative sample of petitioner's publication throughout the audit period.

N. The petition of The Scotsman Press, Inc. is hereby denied in all respects and the notices of determination and demands for payment of sales and use taxes due dated June 12, 1984 are in all respects sustained.

DATED: Albany, New York
November 3, 1988

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE